02-963

No. 02-

Supreme Court, U.S.
FILED
JAN 23 2003

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

STEPHANIE LANDRY
LANDRY & LUDEWIG, L.L.P.
1007 Marquette NW
Albuquerque, NM 87102
(505) 243-6100

Counsel for Respondents

JOHN VAIL*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2887

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether any claim that Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts the holding of the New Mexico Supreme Court in this case has been properly preserved for review by this Court?

2. Whether the holding of the New Mexico Supreme Court that, as a matter of state law, the state regulation that mandated arbitration in this case was void *ab initio* because the New Mexico Superintendent of Insurance had no authority to enact it, is an independent and adequate state ground for the court's decision?

3. Whether the Federal Arbitration Act, if it requires enforcement of state-mandated arbitration of disputes cognizable at common law, is consistent with the First, Seventh, Tenth and Fourteenth Amendments to the Constitution?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iv

Statement of Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of Case 6

Reasons for Denying the Petition 13

I. No Issue of FAA Preemption Was Properly Preserved for Review by this Court 13

II. The Nullification of a State Regulation Mandating Arbitration Clauses in Insurance Contracts Is Outside the Purview of the FAA and Constitutes Adequate and Independent Grounds tor the Decision of the New Mexico Supreme Court 15

III. Invalidation of this Arbitration Clause Because it Precluded Vindication of Statutory Rights Is Consistent with the FAA and Permissible Under the McCarron-Ferguson Act 16

IV. If the FAA Were Found to Require the Enforcement of State-Mandated Arbitration, the Constitutionality of the FAA Would Be Dubious 17

Conclusion 19

TABLE OF AUTHORITIES

CASES:

Board of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994) 8, 10

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 14

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002) ... 17

Gavlik Constr. Co. v. H. F. Campbell Co., 526 F.2d 777 (3d Cir. 1975) 14

Gonzales v. Surgidev Corp., 120 N.M. 133, 899 P.2d 576 (1995) 13

Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244 (9th Cir. 1995) 17

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 18, 19

Harbuck v. Marsh Block & Co., 896 F.2d 1327 (11th Cir. 1990) 14

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986). 13-17

Jones v. Employment Serv. Div., 95 N.M. 97, 619 P.2d 542 (1980) 9, 12

Mechem v. City of Santa Fe, 96 N.M. 668, 634 P.2d 690 (1981) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 17

Southland Corp. v. Keating, 465 U.S. 1 (1983) 14

State ex rel. Helman v. Gallegos, 114 N.M. 414, 839 P.2d 624 (Ct. App. 1992) 9

State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976) 13

Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 14, 17, 19

White v. Board Education Silver City, 42 N.M. 94, 75 P.2d 712 (1938) 15

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. I 5, 18

U.S. CONST. amend. VII 5, 18

U.S. CONST. amend. X 6

U.S. CONST. amend. XIV 6, 18

STATUTES & CODES:

15 U.S.C. § 1012 ..... 5, 17

28 U.S.C. § 1257(a) 1

9 U.S.C § 2 ..... 11, 13

N.M. ADMIN. CODE tit. 13, § 14.18.14 18

N.M. ADMIN. CODE tit. 13, § 14.6A.12 7

N.M. ADMIN. CODE tit. 13, § 14.6A.8 7

N.M. ADMIN. CODE tit. 13, §14.2.11.4 7

N.M. STAT. ANN. 1978 § 44-7-1 10

N.M. STAT. ANN. 1978 § 44-7-12 10

N.M. STAT. ANN. 1978 § 44-7-19 10

N.M. STAT. ANN. 1978 § 57-12-10 (1987) 4, 11, 17

N.M. STAT. ANN. 1978 § 59A-16-30 (1990) 2, 9, 11, 16

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioners suggest that this Court has jurisdiction of their claim pursuant to 28 U.S.C. § 1257(a). While consideration of the Petition is appropriate under that statute, Respondents suggest an ultimate lack of jurisdiction, as the decision below rests on independent and adequate state grounds.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are statutory and constitutional provisions relevant to the issues before this Court which were not cited by the Petitioners:

The New Mexico Insurance Unfair Practices Act provides:

> Private right of action
>
> Any person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party if:
>
> A. the party complaining of the violation of that article has brought an action that he knew to be groundless; or
>
> B. the party charged with the violation of that article has willfully engaged in the violation.
>
> The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state; provided, however, that the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law provide exclusive remedies.

N.M. STAT. ANN. 1978 § 59A-16-30 (1990).

The New Mexico Unfair Practices Act provides:

> Private remedies

A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required. Relief granted for the copying of an article shall be limited as to the prevention of confusion or misunderstanding as to source.

B. Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($ 100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($ 300), whichever is greater, to the party complaining of the practice.

C. The court shall award attorneys' fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if he prevails. The court shall award attorneys' fees and costs to the party charged with an unfair or deceptive trade practice or an unconscionable trade practice if it finds that the party complaining of such trade practice brought an action which was groundless.

> D. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.
>
> E. In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.

N.M. STAT. ANN. 1978 § 57-12-10 (1987).

The McCarron-Ferguson Act provides:

> Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act,

> and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

The First Amendment to the United States Constitution provides:

> Religious and political freedom.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Seventh Amendment to the United States Constitution provides:

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

The Tenth Amendment to the United States Constitution provides:

> Powers reserved to states or people.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

The Fourteenth Amendment to the United States Constitution provides:

> Sec. 1: [Citizens of the United States.]
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

STATEMENT OF CASE

Respondents, Nicholas and Geraldine Lisanti, sued Petitioners, Alamo Title Insurance of Texas and its apparent successor, Fidelity National Title Insurance Company, in Torrance County, New Mexico District Court. They alleged violation of the New Mexico Insurance Unfair Practices Act, breach of fiduciary duty, breach of contract,

breach of good faith and fair dealing, and violation of the New Mexico Unfair Practices Act.

Respondents asked the trial court to stay arbitral proceedings which had been initiated by Petitioners. Those proceedings involved certain claims also the subject of litigation. Respondents asserted that the arbitration clause giving rise to the arbitral proceedings was a nullity.

The arbitration clause in question was mandated by the state.[1] Respondents asserted in their verified complaint

---

[1] The title insurance regulations codified in the New Mexico Administrative Code preclude the sale or purchase of title insurance without the inclusion of the arbitration clause contained in N.M. ADMIN. CODE tit. 13, § 14.6A.12. *See* N.M. ADMIN. CODE tit. 13, §§14.2.11.4, 14.6A.8, 14.6A.12. The regulation requires the following language in agreements between sellers and purchaser:

> Unless prohibited by applicable law, either the Company or the Insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is $1,000,000 shall be arbitrated only when

that the arbitration clause was invalid for reasons Petitioners now aver are inconsistent with the FAA:

> 75. The Lisantis never agreed to the arbitration clause. Instead, the Title Company's claim for arbitration is based on an arbitration clause that, according to the Title Company, is required by the New Mexico Department of Insurance. Any administrative requirement that the Lisantis arbitrate fails to meet constitutional standards as set forth in Board of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), and is therefore unenforceable.
>
> 76. In any event, the claims set forth herein, including without limitation insurance coverage and duty to defend issues and the Lisantis' statutory and punitive damages

---

> agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

It is undisputed that the claim between the parties here was for under one million dollars.

> claims, are not arbitrable as a matter of public policy.
>
> * * *
>
> 80. Wherefore, this Court should declare the arbitration clause unenforceable and enjoin the Title Company from proceeding with arbitration.

Respondents' motion in the trial court[2] also raised the issues Petitioners now aver give rise to FAA preemption. In the motion, Respondents raised the lack of authority of the Superintendent of Insurance to mandate arbitration by promulgating a regulation:

> [T]he Insurance Unfair Practices Act provides that a person who has suffered damages as a result of a violation of the Act is "granted a right to bring an action in district court to recover actual damages." NMSA 1978, § 59A-16-30 (1990) (emphasis added). The Department of Insurance cannot change statutory law. See Jones v. Employment Serv. Div., 95 N.M. 97, 99, 619 P.2d 542, 544 (1980); State ex rel. Helman v. Gallegos, 114 N.M. 414, 418, 839 P.2d 624, 628 (Ct. App. 1992).

Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants from Pursuing Arbitration and Memorandum in Support Thereof, at pp. 3-4.

---

[2] Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants From Pursuing Arbitration and Memorandum in Support Thereof.

The Respondents further relied on the New Mexico Supreme Court case of *Board of Educ. of Carslbad Mun. Sch. v. Harrell*, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), in which the New Mexico Supreme Court had set criteria for determining whether a state mandated arbitration provision exceeded delegated authority. Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants from Pursuing Arbitration and Memorandum in Support Thereof, at pp. 3-4.

Petitioners joined these issues on state law grounds, claiming that the regulation mandating arbitration was within the powers of the Superintendent of Insurance and that it did not violate state statutes or the state constitution.

Petitioners concede that they never raised the issue of federal preemption at the trial court level. Petition, at p. 7. In fact, Petitioners made no mention of the FAA *at all* as having any bearing on the case. *See* Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities. Instead, the Petitioners stated at the trial court level that "[t]he law of the situs in this case includes the provisions of the New Mexico Uniform Arbitration Act, NMSA 1978 Sections 44-7-1 *et seq.* and specifically would include Section 44-7-12 Vacating an Award and Section 44-7-19 Appeals which provide for appellate [sic] of decisions of the District Court." Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities, at p. 6.

The Petitioners did not dispute the Lisantis' verified factual assertion that there was no "written agreement"[3] to arbitrate.

The trial court denied the injunctive relief Respondents requested. Interlocutory appeal was taken to the state intermediate appellate court, which reversed and remanded for trial.

In holding the arbitration clause invalid, the New Mexico Court of Appeals found that the clause violated a state statute regulating insurance practices:

> With respect to their statutory claims, the Lisantis argue that the mandatory arbitration clause promulgated by the superintendent conflicts with NMSA 1978 § 59A-16-30 (1990), which provides that any person who has suffered damages as the result of a prohibited insurance practice 'is granted a right to bring an action in district court to recover actual damages"

Pet. App. 23a; found that the clause inhibited enforcement of other statutory rights:

> and [the clause conflicts] with NMSA 1978, § 57-12-10 (1967, as amended through 1987) which contemplates that any private action seeking redress for an unfair or deceptive trade practice will be brought in a 'court'

---

[3] A written agreement to arbitrate is a criterion for coverage by the FAA. 9 U.S.C § 2.

Pet. App. 23a; and found that state statutes[4] and the state constitution[5] denied the Superintendent of Insurance authority to enact a regulation compelling arbitration.

The Petitioners sought review in the New Mexico Supreme Court of the decision of the intermediate appellate court. For the first time, in their petition for certiorari, the Petitioners raised the preemption issue. The New Mexico Supreme Court refused to address the issue because "it was not raised to the trial court or to the Court of Appeals." Pet. App. 14a.

In affirming the New Mexico Court of Appeals, the New Mexico Supreme Court approved the rationale of the Court of Appeals that "an agency by regulation cannot overrule a specific statute." Pet. App. 6a. The New Mexico Supreme Court also found that the constitution of New Mexico precluded the Superintendent of Insurance from mandating arbitration of this dispute. Pet. App. 8a-9a, 15a.

---

[4] "The Legislature's specific designation of courts as the proper tribunal for resolution of these statutory claims controls over any inconsistent forum selection provision imposed by the superintendent of insurance. *See Jones v. Employment Serv. Div. of the Human Servs. Dep't*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) ("If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute.')." Pet. App. 24a.

[5] "The Lisantis argue that binding state-compelled arbitration abridges their right to a jury trial of their common-law counts. We agree." Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

I. NO ISSUE OF FAA PREEMPTION WAS PROPERLY PRESERVED FOR REVIEW BY THIS COURT

As a general rule, of course, issues may not be raised for the first time on appeal.[6] A narrow exception exists for certain preemption claims.

A party can raise a preemption argument for the first time on appeal if a state court's jurisdiction is preempted by federal law vesting exclusive jurisdiction over the controversy in another body; this is known as choice of forum preemption. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387-88 (1986). As a matter of state practice, New Mexico employs the same standard. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995) (a federal preemption argument cannot be raised for the first time on petition to the New Mexico Supreme Court unless the federal statute displaces state courts as forums).

Petitioners try to fall within the exception set forth in *Davis* and *Surgidev* by arguing, "[t]he FAA is clearly and unequivocally choice of forum preemption." Pet. at 24. Petitioners cite to no authority for this proposition, except to the arbitration act itself, 9 U.S.C. § 2, *supra*, which merely states that arbitration clauses in transactions involving interstate commerce are enforceable. It says nothing about preemption.

The argument is untenable. This Court cautioned in *Davis* that the exception it was creating was a narrow one:

---

[6] *See State v. Sanchez*, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976). Hundreds of New Mexico cases have applied this general rule.

> [O]ur decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual regulatory or adjudicatory power *as opposed to a state's substantive laws.*

Davis, 476 U.S. at 391, n. 9 (emphasis supplied). Nothing in the FAA divests state courts of jurisdiction to hear matters regarding the enforceability of arbitration clauses. "It is . . . well-settled that state courts have jurisdiction to hear cases arising under the Federal Arbitration Act." *Harbuck v. Marsh Block & Co.*, 896 F.2d 1327 (11th Cir. 1990). *See also Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989)(The Federal Arbitration Act "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."). This Court has entertained numerous disputes regarding the enforceability of arbitration clauses that initially have been heard by state courts. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1 (1983); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

The narrow exception of *Davis* does not save Petitioners from their failure to timely raise the issue of preemption of "a state's substantive laws." *Davis*, 476 U.S. at 391, n. 9.

Even if the Petitioners could raise the issue for the first time on appeal, the Petitioners failed to present evidence or seek any findings on the issue of the nexus of this agreement with interstate commerce. This failure renders the Court without the ability to review the issue on appeal. *See Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975) (holding that the absence of findings precluded the Third Circuit's consideration of the applicability of the Federal Arbitration Act). *See also Davis*, 476 U.S. at 398-399 (in which the Court held that

the party asserting preemption must make an affirmative showing that the activity is subject to federal law).

II. THE NULLIFICATION OF A STATE REGULATION MANDATING ARBITRATION CLAUSES IN INSURANCE CONTRACTS IS OUTSIDE THE PURVIEW OF THE FAA AND CONSTITUTES ADEQUATE AND INDEPENDENT GROUNDS FOR THE DECISION OF THE NEW MEXICO SUPREME COURT

This Court will not review the decision of a state supreme court when the decision is supported by independent and adequate state law grounds. *Davis*, 476 U.S. at 387. The ruling of the New Mexico Supreme Court that the New Mexico Superintendent of Insurance was without authority, as a matter of state law, to compel these parties to arbitrate their claims is wholly outside the purview of the FAA and purely a matter of state law. It suffices to support the ruling of the court.

The arbitration clause at issue here exists solely because of state action. The relevant inquiry of the New Mexico Supreme Court was confined to whether the state action was valid, not whether the arbitration clause was valid:

> Because the *regulation requiring mandatory arbitration* violates the Lisanti's right to trial by jury, we hold that *it* is unenforceable.

Pet. App. 15a (emphases supplied). The Court merely invalidated a regulation. As a matter of state law, this rendered the regulation void *ab initio*. *See, e.g., White v. Board Education Silver City*, 42 N.M. 94, 75 P.2d 712 (1938) (holding that unconstitutional government conduct is void *ab initio*.) *See also Mechem v. City of Santa Fe*, 96 N.M. 668, 634 P.2d 690 (1981) (striking from a government

contract and permit an unconstitutional regulatory and contractual provision restraining alienation of property).

No other rationale of the New Mexico Supreme Court is necessary to support its holding. This rationale constitutes independent and adequate state grounds for the holding and requires that no review take place in this court. *Davis*, 476 U.S. 387-88.

III. INVALIDATION OF THIS ARBITRATION CLAUSE BECAUSE IT PRECLUDED VINDICATION OF STATUTORY RIGHTS IS CONSISTENT WITH THE FAA AND PERMISSIBLE UNDER THE MCCARRON-FERGUSON ACT

The New Mexico Supreme Court invoked alternative rationales for its decision. These rationales are subject to analysis under the FAA, but the treatment of them by the New Mexico court is consistent with the FAA and renders review in this court unnecessary.

The New Mexico Supreme Court affirmed the holdings of the Court of Appeals that this arbitration clause was unenforceable because it interfered with vindication of statutory rights under the Insurance Code and the Unfair Practices Act.[7] The FAA permits the non-

---

[7] Pet. App. at 5a. Respondents brought claims under the Insurance Unfair Practices Act and under the New Mexico Unfair Practices Act. These statutory claims grant the Respondents the right to seek relief through the courts and, in the case of the Unfair Practices Act, treble damages. The Insurance Unfair Practices Act provides that a person who has suffered damages as a result of a violation of the Act is "granted a right to bring an action in district court to recover actual damages." NMSA 1978, § 59A-16-30 (1990). The Unfair Practices Act provides that "the court may

enforcement of arbitration clauses when they preclude the vindication of statutory rights. *See, e.g., Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995).

Even if preemption law under the FAA precluded the court's holding with regard to the Unfair Practices Act, the McCarron-Ferguson Act, 15 U.S.C. § 1012, which protects the State's power to regulate the business of insurance, would permit the state Insurance Code to preclude enforcement. The result of the case would remain the same, precluding review by this court. *Davis*, 476 U.S. 387.

IV. IF THE FAA WERE FOUND TO REQUIRE THE ENFORCEMENT OF STATE-MANDATED ARBITRATION, THE CONSTITUTIONALITY OF THE FAA WOULD BE DUBIOUS

The gravamen of this case is that arbitration was not voluntarily agreed to by the parties, as contemplated by the FAA,[8] but that arbitration was mandated by state action.

---

award up to three times actual damages . . ." for violations of the Unfair Practices Act. NMSA 1978, § 57-12-10 (1987).

[8] *Volt*, 489 U.S. at 476 ("the federal policy is simply to ensure the enforceability, according to their terms, of *private agreements to arbitrate.*") (emphasis added). Accordingly, this Court recognized that the Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so." *Id.* "*Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.*" 489 U.S. at 479 (emphasis added). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *cited favorably in E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (The FAA is "at

Petitioners admit, Pet. at 16, that the arbitration clause at issue here is state mandated. They note, "[t]he State Supreme Court and Court of Appeals focused on the mandatory nature of the insurance policy form and specifically the arbitration provision, 13 NMAC 14.18.14, to determine that the Respondents did not voluntarily consent to arbitration when the arbitration clause was imposed upon them by the State."

The Petitioners go on to say, "The State Supreme Court's conclusion that the arbitration clause was non-consensual because it was imposed by state regulation, however, does not fall within the exceptions for non-enforceability of arbitration clauses under the FAA." *Id.* In other words, Petitioners contend that the FAA can compel enforcement of state-mandated arbitration.

Arbitration, by its nature, can constitute a waiver of the First and Fourteenth Amendment rights of access to courts[9] and the Seventh Amendment right to trial by jury.[10] If the FAA required enforcement of state action compelling arbitration, it would itself constitute state action compelling the waiver of fundamental constitutional rights. This would render the constitutionality of the FAA dubious, at

---

bottom a policy guaranteeing the enforcement of private contractual arrangements.").

[9] *See Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901), in which this court equated the right to "free access to courts of justice" with the rights of freedom of expression, freedom to worship, and freedom from unreasonable searches and seizures and noted that all of them are "indispensable to a free government."

[10] *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33,52-53, *infra*.

best. *See, e.g, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-53 (1989)("Congress... lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.... [T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority... nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.")

State-mandated arbitration is better considered, as *Volt* at least suggests it should be, outside the scope of the FAA because of its involuntariness.

CONCLUSION

For the aforementioned reasons, the Petition for Certiorari should be DENIED.

Respectfully submitted,

JOHN VAIL*
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2887

STEPHANIE LANDRY
LANDRY & LUDEWIG, L.L.P.
1007 Marquette NW
Albuquerque, NM 87102
(505) 243-6100

Counsel for Respondents
**Counsel of Record*

January 23, 2003